Supreme Court, U.S.
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No. 03-1520

In the

Supreme Court of the United States

Jeffrey Lee,
Petitioner,

v.

State of Alabama,
Respondent.

On Petition for a Writ of Certiorari to the Court of Criminal Appeals of Alabama

REPLY BRIEF OF PETITIONER

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I. The Court Should Resolve the Deep and Persistent Split of Authority Over the Application of *Ring v. Arizona* to Two Critical Facets of State Capital Sentencing Schemes.

The State of Alabama agrees that both of the *Ring* questions presented in the Petition (Questions 1 and 2) are important and subject to splits of authority among state courts. Resp. at 5. Indeed, as to the first question, the State describes the split of authority as "deep ... and persistent." *Id.* at 7. Moreover, the State acknowledges that it has previously recognized that both of these issues are worthy of certiorari review. *Id.* at 5. Yet the State identifies no procedural or other issue that would make this case one that is unsuitable for addressing the *Ring* questions that the State previously deemed certiorari worthy.

Instead, the State opposes certiorari on the *Ring* issues in this case based solely on the fact that the Court has not granted prior petitions presenting similar questions, such as the *Waldrop* petition. Putting aside the fact that it is not unusual for the Court to allow a split to percolate for a term or two to see if further guidance is necessary, the *Waldrop* petition did not rely on, or otherwise draw the Court's attention to, the splits of authority on the *Ring* questions presented here. Further, since the *Waldrop* petition was denied, the splits have grown, notwithstanding that some states enacted post-*Ring* legislation to address the constitutional flaws in their state's procedures. Finally, the Court's analysis and holding in *Blakely v. Washington*, 124 S. Ct. 2531 (June 24, 2004), strongly suggest that the lower court decisions favoring Mr. Lee's positions are the correct ones.

Particularly in a capital case, and particularly with issues as important as the roles of the jury and judge in choosing between life and death, the Court should not allow further percolation on these questions. The Court should grant the petition and decide the issues. At a minimum, it should grant the petition and remand for consideration in light of *Blakely*.

II. The Court Should Accept Review in Order to Provide Additional Guidance on What Constitutes Meaningful *Batson* Review Where There Is Conflicting Evidence of the Motive for Striking Venire Members.

A. Mr. Lee Properly Preserved His *Batson* Challenge.

The State argues that because Mr. Lee did not frame his *Batson* claim in his previous appeals in the precise manner presented in his petition to this Court, Mr. Lee cannot now obtain review of this claim. Resp. at 14. This simply is not the standard for obtaining certiorari review. Indeed, in *Yee v. City of Escondido*, 503 U.S. 519, 534-35 (1992), cited by the State in support of its argument, the Court made clear that a petitioner need only have raised the claim in state court, not have made the exact arguments to support that claim: "A litigant seeking review in this Court of a claim properly raised in the lower courts thus generally possesses the ability to frame the question to be decided in any way he chooses, without being limited to the manner in which the question was framed below."

In this case, Mr. Lee clearly preserved his claim that the prosecutor's strikes violated *Batson*. Mr. Lee is not required to have formulated the identical arguments in support of his *Batson* claim, but only to have raised the claim below.

B. The Trial Court's Failure to Apply *Batson* Properly Is of Constitutional Significance.

The State contends that Mr. Lee "has failed to demonstrate any compelling reason" why the Court should grant certiorari to consider the *Batson* issue. Resp. at 14-15. To the contrary, as set forth in the Petition, this case requests more than mere "fact-bound error correction." The *Batson* question presented here—whether a facially neutral reason is dispositive where there is evidence that it is pretextual—raises important constitutional questions as to the continued vitality and application of the *Batson* principles. Indeed, as evidenced by the Court's recent grant of certiorari in *Miller-El v. Dretke*, 124 S. Ct. 2908

(2004) the Court has already recognized the ongoing constitutional significance of the *Batson* issues raised in this case.[1]

C. The State's Misapplication of *Batson* Demonstrates the Need for Further Guidance From This Court.

Instead of showing that the prosecutor's conduct was proper under *Batson* or that the court engaged in a proper inquiry regarding the prosecution's stated reasons for using all twenty-one of its peremptory challenges to strike African American venire members, the State argues that the excerpts from the trial transcript contained in the Petition do not constitute a *Batson* violation. The State's argument is nothing more than an attempt to distract the Court from the substance of Mr. Lee's position. Consideration of the full text of the trial court's *Batson* discussion reinforces the conclusion that there is competent evidence suggesting that the prosecution had mixed motives for its use of its peremptory strikes. Pet. App. at 148-51.

More importantly, the State's understanding of the prosecutor's and trial court's obligations under *Batson* demonstrates the need for additional guidance from the Court. The State's *Batson* argument distills to the position that there can be no *Batson* violation because the judge concluded on the record that the prosecutor had stated "facially neutral reasons" for the strikes. Resp. at 15. This assertion misses the point. The State does not dispute that the trial court devoted only eight lines of the trial transcript to reviewing the prosecutor's stated reasons for his twenty-one peremptory challenges and failed to look behind the reasons put forth by the prosecutor to determine whether they were pretextual. It is these fundamental failings and the State's belief that such cursory examination of alleged racial bias is all that a

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[1] Because *Miller-El* may be important to the resolution of these issues, the Court may wish to hold the petition in abeyance and eventually remand in light of the further guidance that will result from the Court's consideration of *Miller-El*.

capital defendant is entitled to, that demonstrate the need for the Court to accept review of this case.

The Court should grant review to determine the inquiry required when evidence exists of the prosecutor's mixed motives for striking venire members. In the alternative, the Court should consider an eventual remand in light of *Miller-El*.

III. The Court Should Reverse the Court of Criminal Appeals' Harmless Error Analysis With Respect to Numerous Undisputed Constitutional Errors at Mr. Lee's Trial

The Alabama Court of Criminal Appeals summarily rejected numerous challenges of constitutional error as to the death sentence by concluding that the error alleged was harmless because the jury recommended a life sentence. Thus, the Court of Criminal Appeals necessarily accepted, at least for purposes of its analysis, that the constitutional errors occurred. Also implicit in the Court of Criminal Appeals' holding is the proposition that the majority vote of the jury recommending life was meaningful.

However, the trial judge, when it decided to impose the death penalty, did not give similar weight to the majority's vote recommending life. Rather, the sentencing judge elected to override the jury's recommendation and impose the death penalty, at least in part because the vote in favor of life was only 7-5. Given the court's statements in that regard, it is clear that the trial court would have been more likely to follow the jury's recommendation if more jurors had voted for life. Thus, to the trial judge who imposed the death penalty, every juror's vote mattered. Accordingly, the Court of Criminal Appeals was required to analyze the possible effect of the constitutional errors alleged on each individual vote, notwithstanding the fact that the majority of the jury had voted in favor of life.

Summary reversal is required so as to protect Mr. Lee's due process rights to a full and fair consideration of the constitutional errors that occurred, not a truncated and superficial harmless error analysis. Mr. Lee properly preserved those constitutional issues by asking for reversal of his death sentence based on the errors, and

should not be denied that relief by the Court of Criminal Appeals' inapplicable harmless error methodology.

* * * * *

For the foregoing reasons and those stated in the Petition, the Court should grant Mr. Lee's petition for writ of certiorari.

RESPECTFULLY SUBMITTED this 29th day of July, 2004.

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